83-2145

No. ______

IN THE

Supreme Court of the United States

October Term, 1983

NAVIOS CORPORATION,
GULFCOAST TRANSIT COMPANY,
A/B HELSINGFORS STEAMSHIP COMPANY, LTD., and
ALIANZA NAVIERA ARGENTINA, S.A.

Petitioners,

v.

THE UNITED STATES OF AMERICA
as owner of the UNITED STATES
COAST GUARD BUOY TENDER BLACKTHORN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit Court of Appeals misapplied Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) when it ruled that a vessel trapped inside a harbor cannot recover its provable economic losses from the party whose negligence caused the obstruction of the harbor.

INTERESTED PARTIES

The following listed persons were parties below and have an interest in the outcome of this case.

Gulfcoast Transit Company
Navios Corporation
A/B Helsingfors Steamship Co., Ltd.
Alianza Naviera Argentina, S.A.
United States of America
Kingston Shipping Co., Inc.
Apex Marine Corporation
ABC Containerline, M.V.
Wallenius Rederierna and Motorships, Inc.
Marthanassa Compania Naviera, S.A.
Oceanside Limited
I.S. Joseph Shipping Company, Ltd.
I.S. Joseph Shipping Company, Inc.
Clipper Maritime Co., Ltd.
Ultraocean, S.A.
Pell Nederland, B.V.
Hannah Marine Corp.
Temar Navigation Co.
Turbana Banana Corp., S.A.
The United Kingdom Freight Demurrage
& Defense Associated, Ltd.
Polish Steamship Company

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STATEMENT OF PROCEEDINGS BELOW

Pursuant to 28 U.S.C. Section 1254(1), petitioners, Gulfcoast Transit Company, Navios Corporation, A/B Helsingfors Steamship Company, Ltd., and Alianza Naviera Argentina, S.A., file this petition for a writ of certiorari seeking review of the Eleventh Circuit Court of Appeals March 30, 1984, en banc order dismissing petitioners' claims against the United States Coast Guard Buoy Tender BLACKTHORN (A. 35).[1] The Eleventh Circuit had previously granted petitioners' request for a rehearing en banc to determine whether Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) precluded the recovery of economic loss in the

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[1] "A." refers to the attached appendix.

absence of physical impact or damage (A. 30, 32). Equally divided on the proper application of Robins, the Eleventh Circuit's en banc order affirmed the three judge panel's dismissal order by operation of law (A. 35), 728 F.2d 1359 (11th Cir. 1984).[2]

Petitioners filed a timely petition for rehearing from the Eleventh Circuit's affirmance en banc of the dismissal of petitioners' claim. That petition for rehearing was denied without opinion on May 18, 1983 (A. 37). This petition for writ of certiorari followed.

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[2] The en banc panel was split six-to-six on the proper impact of Robins on this case (A. 35).

STATEMENT OF THE CASE AND FACTS

On January 28, 1980, the United States Coast Guard Buoy Tender, BLACKTHORN, collided with the S/S CAPRICORN, a fully loaded tanker. As a result of the collision, the BLACKTHORN sank, completely blocking the only deep-draft ship channel into and out of Tampa Bay. Until the BLACKTHORN was raised 26 days later, it was impossible for any deep-draft vessel to either enter or leave the Port of Tampa. Petitioners, Gulfcoast Transit Company, Navios Corporation, A/B Helsingfors Steamship Co., Ltd., and Alianza Naviera Argentina, S.A.[3] are the owners of deep-draft vessels that

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[3] The petitioners will be collectively referred to as "Claimants" in this petition.

were trapped within the bay by the wreck of the BLACKTHORN.

Claimants filed a response to the BLACKTHORN's Complaint for Exoneration from or Limitation of Liability[4] seeking damages proximately caused by the BLACKTHORN's negligent obstruction of the channel.[5] Claimants alleged that, at the time of the collision, their vessels were each fully prepared to sail from the Port of Tampa. Because the BLACKTHORN's negligence trapped their vessels within the harbor, Claimants lost the use of

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[4] The jurisdiction of the District Court was predicated on 28 U.S.C. § 1333 and 46 U.S.C. § 181, et seq.

[5] Over twenty vessel interests filed detention claims against the BLACKTHORN in the Limitation of Liability proceeding. Fourteen of those vessels appealed the District Court's dismissal order. This petition is filed on behalf of only Gulfcoast Transit Company, Navios Corporation, A/B Helsingfors Steamship Co., Ltd., and Alianza Naviera Argentina, S.A.

their vessels and were forced to incur detention and stand-by costs, including payment of seamen's wages, provisions, forfeit charges, additional towing charges, wharfage, and fuel.

The district court dismissed Claimants' action for damages (A. 1, 3).

Claimants appealed to the Eleventh Circuit[6] which affirmed the dismissal (A. 12, 30) based on the disposition of

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[6] Oral argument in BLACKTHORN was consolidated by the Eleventh Circuit with argument in The Complaint of Hercules Carriers, Inc. v. State of Florida & Canadian Transport Company. In Hercules Carriers, several vessels whose entrance to and exit from Tampa Bay were blocked by the remains of the May, 1980 Skyway Bridge disaster filed a similar negligence action against the M/V SUMMIT VENTURE, the vessel that had collided with the bridge. Although never formally consolidated, Hercules Carriers, was considered contemporaneously with this case by the three-judge panel and later by the Eleventh Circuit En Banc. Claimants in Hercules Carriers have filed a petition for writ of certiorari with this Court. Canadian Transport Company v. Hercules Carriers, Case No. _____.

the identical legal issue by another three-judge panel of the Eleventh Circuit. Kingston Shipping Company v. Roberts, 667 F.2d 34 (11th Cir.), cert. denied, 458 U.S. 1108 (1982).[7] The Kingston panel, held that Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) foreclosed claimants' recovery of their economic losses because those losses were not accompanied by physical damage to their vessels. Although the three-judge panel in BLACKTHORN was bound by the practice of the Eleventh Circuit to follow the precedent established in Kingston, Judge Clark, concurring specially, questioned whether Robins in fact precludes the recovery of economic loss in the absence of physical damage and urged rehearing en

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[7] Kingston, like the instant case, arose from the collision of the S/S CAPRICORN and the BLACKTHORN.

banc (A. 12, 30). En banc review was granted (A. 32), but the court, equally divided on the proper application of Robins to the delay claims presented by this case, affirmed the decision of the three-judge panel by operation of law (A. 36).

SUMMARY OF THE ARGUMENT

Claimants have suffered provable financial losses from the BLACKTHORN's breach of the most fundamental duty owed by those privileged to traverse the nation's navigable waterways, the duty not to obstruct those waterways. Yet, the Eleventh Circuit, misreading and misapplying this Court's decision in Robins, dismissed Claimants' damage claims, not because Claimants were without injury, but because Claimants' damages were caused by detention rather than physical impact.

The Eleventh Circuit's struggle with the proper application of Robins is not unique. Robins, particularly in the last several years, has been a source of continuing conflict and confusion between and among the circuits regarding maritime tort recovery of "pure" economic loss. That continuing conflict is evidenced by

the fact that the success or failure of a detention claim will largely depend on the circuit within which the detention occurs. Those vessels unfortunate enough to be trapped in the waters of Tampa Bay, Chesapeake Bay, or the mouth of the Mississippi River, will find their damage claims barred by Robins. Those vessels fortuitous enough to be trapped on the upper Mississippi, the Columbia River, or the Hudson River, will almost certainly recover their detention losses in spite of the Robins decision.

The confusion engendered by Robins is illustrated by the struggle within the circuit courts of appeals to settle on the proper interpretation of Robins. The Eleventh Circuit attempted to resolve this confusion but failed, its twelve judges deadlocked. Internal conflicts exist within the decisions of both the Fourth and Fifth Circuits. The Fifth Circuit,

attempting to resolve that conflict, has granted a petition for rehearing en banc in a detention case presenting facts nearly identical to this case.[8] See State of Louisiana ex rel. Guste v. M/V TESTBANK, (A. 41), reported at 728 F.2d 748 (5th Cir. 1984), rehearing en banc granted, (May 14, 1984) (A. 54).

This conflict and confusion need not exist. Robins espoused no rule barring the recovery of economic loss without impact. The Court should restore harmony and unity to maritime tort litigation by issuing the writ and ruling that Robins

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[8] Oral argument en banc will be held in September. The Fifth Circuit's en banc reconsideration of this issue presents the real possibility that the Fifth and Eleventh Circuits will reach the opposite conclusion on identical delay claims even though the two circuits are relying on the same precedent as a result of the historic linkage of the Fifth and Eleventh Circuits in the old Fifth Circuit. See Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

creates no artificial and absolute barrier to the recovery of economic losses in delay and detention cases.

ARGUMENT

I. THE ELEVENTH CIRCUIT ERRED WHEN IT HELD THAT ROBINS FORECLOSED THE RECOVERY OF ECONOMIC DAMAGES UNACCOMPANIED BY PHYSICAL IMPACT.

The Eleventh Circuit's ruling below was based on a fundamental misconception of Robins. According to the Eleventh Circuit:

> Robins made clear that a party may not recover for economic losses not associated with physical damages.

Kingston Shipping Company v. Roberts, 667 F.2d 34 (11th Cir.), cert. denied, 458 U.S. 1108 (1982).[9]

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[9] The order of the three judge panel below was a one paragraph per curiam opinion referring the parties to the legal analysis in Kingston (A. 30), 720 F.2d 1206 (11th Cir. 1983). Although the per curiam opinion was brief, Judge Clark, in a special concurrence, carefully analysed the Robins rule and recommended

No such statement or inference appears anywhere in the Robins opinion. In Robins, the time charterers of the S/S BJORNEFJORD sought damages from a dry dock for loss of use of the BJORNEFJORD. While the BJORNEFJORD was in dry dock for normal repairs, the dry dock's negligence caused the vessel to be detained for several extra days. The Court held that the owner of the BJORNEFJORD, but not the time charterers, had a cause of action against the dry dock company. According to Justice Holmes:

> As a general rule at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under contract with that other, unknown to the doer of the wrong.

275 U.S. at 409.

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that the Eleventh Circuit recede from Kingston. As noted above, rehearing was granted but the Eleventh Circuit was unable to resolve the conflict.

The time charterers were prevente from recovery, not because they had suffered no impact, but because they had absolutely no relationship with the tortfeasor who, in turn, had no reason to suppose the existence of the time charter or the time charterers. This unforeseen and indirect relationship could not give rise to a duty to the time charterers on the part of the dry dock.

Put in more general terms, if A injures B and that injury to B prevents B from fulfilling an unforeseen contractual obligation with C, C has no cause of action against A. Hercules Carriers, Inc., (A. 12) reported at 720 F.2d at 1203 (11th Cir. 1983) (Clark, J., concurring specially). C's parasitical injury, which is only incidental to the damage inflicted upon B by A, is simply too far removed from the original injury to permit recovery. According to Justice Holmes, "the

law does not spread its protection so far." 275 U.S. at 309.

Robins, however, makes no sense if the focus is on impact rather than the relationship between the parties. Suppose, for example, that the BJORNEFJORD was delayed, not because of damage to its propeller, but rather because the negligent malfunction of the dry dock company's pump prevented the BJORNEFJORD from being refloated and thus, trapped it within the dry dock. If Robins were an impact case, the owner of the BJORNEFJORD would have no cause of action against the dry dock because the vessel was not physically damaged. Of course, no court could reach such a result. See e.g. In re Petition of Boat Demand, Inc., 174 F. Supp. 668 (D. Mass. 1959); The JAMAICA, 51 F.2d 858 (W.D.N.Y. 1931). The direct relationship between the dry dock company and the

owner of the BJORNEFJORD would ensure recovery.[10]

II. IT IS IMPORTANT FOR THE COURT TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS OVER THE PROPER LIMITATION, IF ANY, ROBINS PLACES ON THE RECOVERY OF ECONOMIC LOSSES.

This Court has long recognized that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." Moragne v. States Marine Lines, 398 U.S. 375, 402 (1970), citing, The Lottawanna, 88 U.S.

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[10] The recovery of economic losses without physical impact was already well established in maritime tort law long before the Robins decision. For example, in New York N.H. & H.R. Co. v. Piscataqua Navigation Co., 108 F. 92 (1st Cir. 1901), the First Circuit awarded exactly the types of detention damages awarded here. Yet, Robins made no attempt to explain or distinguish those cases. Of course, there was no need to because Robins was not formulating an impact rule.

(21 Wall.) 558, 575 (1875). The court's "strong concern for uniformity" in admiralty law, Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 601 (1974), is directed at maintaining the smooth flow of maritime commerce by ensuring that "all vessel operators are subject to the same duties and liabilities." Foremost Insurance Co. v. Richardson, 457 U.S. 668, 676 (1982).[11]

The current state of the law regarding detention claims could hardly be less uniform. The circuit courts are hopelessly deadlocked in their analysis of whether Robins erected an artificial and absolute barrier against the recovery of

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[11] Thus, this Court has granted certiorari in other areas of maritime law where damage rules were either outdated or subject to radically conflicting interpretations by the circuit courts. See e.g., United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975).

detention or other pure economic losses. Thus, the recovery of detention claims depends not on the nature of the relationship between the negligent party and the injured party, but rather upon the body of water in which the vessel happens to be detained.

The Fourth, Fifth,[12] and Eleventh Circuits have categorically denied recovery of detention claims based on their restrictive reading of Robins (or precedent that misconstrues Robins). See Akron Corp. v. M/V CANTIGNY, 706 F.2d 151 (5th Cir. 1983); Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc., 638 F.2d 700 (4th Cir. 1981); Kingston Shipping Co. v. Roberts, 667 F.2d

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[12] Of course, the Fifth Circuit is now reconsidering the detention issue en banc (A. 53), State of Louisiana ex rel. Guste v. M/V TESTBANK, No. 82-3059 (5th Cir. May 14, 1984).

34 (11th Cir.), cert. denied, 458 U.S. 1108 (1982).

At least four other circuits have rejected the application of a per se "Robins impact rule" either implicitly or directly. In Chicago & W.I.R. Co. v. M/S BUKO MARU, 505 F.2d 579 (7th Cir. 1974), the Seventh Circuit held that railroads that incur increased expenses as a result of the destruction of a bridge have a cause of action in maritime tort against the vessel that collided with and damaged the bridge, even though the railroads did not own the bridge and therefore suffered no physical damage.

In the First Circuit, at least three courts have permitted recovery of economic detention losses in the absence of impact. For example, in In re Petition of Boat Demand, Inc., 174 F. Supp. 668 (D. Mass. 1959), the sinking of defendant's vessel partially blocked plaintiff's dock. The

court permitted the plaintiff to recover the economic loss it suffered because the sunken vessel prevented plaintiff from using the dock. The direct impact of the defendant's negligence on the plaintiff, despite the lack of physical damage, persuaded the court to permit recovery. Plaintiff was in the foreseeable zone of danger. See also New York N.H. & H.R. Co. v. Piscataqua Navigation Co., 108 F. 92 (1st Cir. 1901); Burgess v. M/V TAMANO, 370 F. Supp. 247 (D. Me. 1973). Cf., Green Mountain Power Corporation v. General Electric Corporation, 496 F. Supp. 109 (D. Vt. 1980) (economic losses suffered as a result of defendant's failure to supply electrical power held recoverable).

The decisions of the Second and Ninth Circuits rejecting the Robins impact rule are perhaps more well known. In Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821 (2d Cir. 1968), the Second Circuit

addressed a bizarre chain of connected events occuring along the Buffalo River that eventually culminated in economic loss to the plaintiffs. The district court rejected plaintiffs' damage claims holding that Robins prohibited recovery because plaintiffs had suffered no physical impact or damage. Although it eventually ruled against plaintiffs, the Second Circuit rejected the existence of an absolute rule barring recovery for pure economic loss:

> Several cases often cited as illustrations of the application of the "negligent interference with contract" doctrine, have been convincingly explained in terms of other more common tort principles. Indeed, Professors Harper and James suggested that the application of the doctrine is wholly artificial in most instances. We therefore prefer to leave the rock-strewn path of "negligent interference with contract" for more familiar tort terrain.

388 F.2d at 824 (citations ommitted). Thus, the court rejected a per se rule that would bar recovery in all cases. The particular claims before the court in Kinsman were rejected only because the relationship of the plaintiffs' damage to the original negligence was too tenuous.[13] See also The JAMAICA, 51 F.2d 858 (W.D.N.Y. 1931).

The Ninth Circuit has most clearly rejected artificial barriers to economic loss recovery. In Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), plaintiffs were commercial fishermen whose catches were drastically reduced due to an oil spill caused by the defendant's negligence. Despite the fact that plaintiffs suffered no physical damage to

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[13] Considering the bizarre "concatenation of events" on the Buffalo River that night, the court's holding is not surprising. 388 F.2d at 822-23.

their property, the Ninth Circuit held that the fishermen could recover their damages from the oil company. The absence of impact was irrelevant. Because the oil company's negligence directly and foreseeably impacted upon the fishermen's livelihood, recovery was appropriate.

A conflict exists that can be resolved only by this Court. To restore unity to maritime tort law in the area of economic damages, this Court should grant the petition for writ of certiorari.

III. ABSENT THE ARTIFICIAL BARRIER ERECTED BY THE MISAPPLICATION OF ROBINS, TRADITIONAL TORT PRINCIPLES DEMONSTRATE THAT RECOVERY OF DETENTION CLAIMS IS APPROPRIATE.

The irony of the restrictive interpretation placed upon Robins by the Fourth, Fifth, and Eleventh Circuits is evident when one considers the enormous

strides taken by the law of torts since Robins was decided in 1927. For most of this century, the courts have been concerned with breaking down ancient and obsolete barriers to tort recovery. See e.g., United States v. Reliable Transfer Co., 421 U.S. 397 (1975); Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1962); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). Yet, these circuits have unnecessarily construed this nearly 60 year-old decision to raise an artificial barrier to the recovery of certain types of economic losses in maritime tort.

There is nothing different or special about economic as opposed to physical losses. Indeed, there was no dispute below that if the Claimants had suffered the slightest scintilla of physical harm at the hand of the BLACKTHORN, all their

losses, economic or otherwise, would be recoverable. E.g., Vicksburg Towing Co. v. Mississippi Marine Transport Co., 609 F.2d 176 (5th Cir. 1980). Impact has become important only because it serves as a "bright line" boundary to separate immediate injury from indirect injury, and to weed out tenuous claims. State of Louisiana ex rel. Guste v. M/V TESTBANK, 728 F.2d 748, 750 (5th Cir. 1984) (Wisdom, J., concurring specially). Of course, every such artificial bright line distinction comes at a price; meritorious claims will necessarily be discarded along with those tenuous claims deserving of dismissal. Id.

As the First, Second, Seventh, and Ninth Circuits have recognized, reliance upon "impact" as a crutch to separate direct from incidental claims is unnecessary. Traditional tort principles such as foreseeability, proximate causation, and

duty can serve that function more reliably and without the artificial dismissal of deserving claims. M/V TESTBANK, 728 F.2d at 750 (Wisdom, J.); Hercules Carriers, Inc., 720 F.2d at 1205 (Clark, J., concurring specially); Kinsman Transit, 388 F.2d at 824.

The analysis of the instant detention claims under traditional tort principles is straightforward. The duty breached by the BLACKTHORN was direct and substantial. The fundamental premise underlying the whole of admiralty law is the free and safe navigability of the nations' waterways. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). The BLACKTHORN's negligence in this case admittedly interrupted that flow. Yet the court below would shift the resulting loss from the BLACKTHORN to those whose rights of free navigability were violated. This Court in an analogous situation addressed

the obstruction of navigable waterways and held that such a result would be absurd:

> There is no indication anywhere else in the legislative history of the act, in the predecessor statutes, or in non-statutory law that Congress might have intended that a party should be shielded from personal responsibility....
>
> Denial of such a remedy to the United States would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim.

Wyandotte Transportation Co. v. United States, 389 U.S. 191, 201, 204 (1967) (emphasis added). To impose the "impact rule" in this case is to completely absolve the BLACKTHORN of liability for these losses. Such absolution can hardly serve the purposes of free and safe navigability.

The delay claimants in this case were members of a special and narrow class of users dependent on the channel for their

livelihood. Disruption of that livelihood was the direct and foreseeable impact of the BLACKTHORN's negligence. See Union Oil v. Oppen, 501 F.2d at 569-70. Unlike the time charterers in Robins, their injury is not based upon an unforseeable contractual relationship. If Robins applies in this case, it is merely to bar the claims of those who are only incidentally damaged by the blockage of the channel (for example, businesses that were tangentially damaged because the delayed vessels were unable to deliver goods in a timely fashion, or a time charterer whose use of a vessel was disrupted).[14] See

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[14] All of the Claimants in this case are owners (not charterers) of vessels directly suffering loss as a result of their detention within the harbor. Thus, the only barrier arguably raised by Robins is the impact limitation imposed by the Eleventh Circuit below.

Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981); Burgess v. M/V TAMANO, 370 F. Supp 247 (D. Me. 1973) (claims of shore businesses dismissed); Federal Commerce & Navigation Co. Ltd. v. M/V MARATHONIAN, 528 F.2d 907 (2d Cir. 1975), cert. denied, 425 U.S. 975 (1976) (time charterers' claims dismissed).

To approve the artificial barriers raised by the Eleventh Circuit below would be to impose burdens upon maritime tort plaintiffs that have long since eroded in other areas of American tort law. Economic losses have long been recoverable when, as in this case, there exists a close enough relationship between the parties. W. Prosser, The Law of Torts 952 (4th Ed. 1971). For example, courts have permitted third parties who are damaged by the garbled transmission of a telegraph message to recover their economic losses

from the telegraph company despite the absence of either contractual privity or "impact." E.g. McQuilkin v. Postal Telegraph Cable Company, 27 Cal. App. 698, 151 P. 21 (Cal. App. 1915). Professionals whose negligence causes foreseeable injury to third parties have been liable to those third parties for economic losses, even in the absence of either contractual privity or physical damages. See extensive authority cited in Union Oil v. Oppen, 501 F.2d at 566 n.9. For example, in Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (N.Y. 1922), Judge Cardozo's opinion imposed liability on a public weigher whose negligent weight certification caused pure economic damage to a third party. The foreseeability of damage to a third party created a duty of care on the part of the weigher not only towards his contracting party, but to foreseeably

injured parties. See also Hedley Byrne & Co. Ltd. v. Heller & Partners, Ltd., [1964] A.C. 465 (1964) (economic loss suffered as a result of negligent misrepresentation recoverable).[15]

Similarly, since the landmark decision of Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), barriers raised against the recovery of economic losses in products liability actions have been receding rapidly. In

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[15] An analogy can be drawn to the gradual erosion of the "impact rule" in negligent infliction of emotional distress cases. Numerous courts have decided that principles of foreseeability and provability of damages are a better yardstick to recovery than the fact of impact. See Daley v. La Croix, 384 Mich. 4, 179 N.W.2d 390 (1970); Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912 (1968). In other settings, tort recovery without physical impact is commonplace (for example, a survivor's action for wrongful death, e.g., Section 768.27, Florida Statutes (1981), or a spouse's action for loss of consortium).

Santor the purchaser of a defective carpet was permitted to maintain an action against the manufacturer for purely economic losses even in the absence of physical damage. Within the last several months both the Ninth and Eleventh Circuits have reached similar results in products liability actions and permitted recovery of pure economic loss.[16] Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468 (9th Cir. 1984); Miller Industries v. Caterpillar Tractor Co., No. 83-7169 (11th Cir. June 1, 1984).[17]

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[16] The fact that the Eleventh Circuit permitted the recovery of pure economic losses in this non-admiralty setting underscores the artificiality of its restrictive interpretation of Robins.

[17] Courts in other common law countries have rejected the type of artificial barriers to recovery erected by the court below. In Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad", 51 A.L.J.R. 270 (1977) the Australian high

Implicitly recognizing that a detailed examination of their claims under traditional tort principles will result in liability, defendants supported the bright line impact rule, arguing to the Eleventh Circuit that recovery in this case will open the floodgates to a deluge of tenuous claims. Of course, the fact that negligence may expose a defendant to a large damage verdict does not immediately invalidate the underlying tort action. In the products liability arena, for example,

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court analyzed the recovery of economic damages absent physical injury. The five justices unanimously held that pure economic loss is recoverable. Addressing the defendant's argument that elimination of the impact rule would expose shipping companies to potentially draconian liability, the justices held that traditional tort concepts such as foreseeability, causation, and duty would more properly serve to limit recovery. See also Seaway Hotels, Ltd. v. Cragg, (Canada) Ltd., 21 D.L.R.2d 264 (Ct. App. Ontario 1959) (permitting a hotel to recover economic losses suffered as a result of the negligent interruption of electrical power to the hotel).

a manufacturer's single misstep can have enormous financial consequences. But in this case, the relative impact of delay claims is slight. Vessel owners have long been able to cope with the enormous risks of physical damage attendant with any sea voyage.[18]

Moreover, numerous mechanisms are available to the courts to ensure that the spectres raised by the BLACKTHORN do not overburden the courts or maritime interests. The first and most obvious limitation is foreseeability. When the defendant's negligence is only indirectly connected to the obstruction, when the obstruction is created by a chain of

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[18] In the instant case the claims for physical injury or damage against the BLACKTHORN totaled over seventy million dollars. The delay claims asserted against the BLACKTHORN totaled barely over two million dollars. In the companion Hercules Carriers case, the SUMMIT VENTURE destroyed half of the Sunshine Skyway bridge which is now being replaced at a cost of well over One Hundred Million Dollars. Clearly, defendant's draconian liability argument is a red herring.

unlikely events, or when damages rise to astronomical levels because of a strange combination of events, the court can limit the defendant's losses to those that are directly foreseeable. Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821 (2d Cir. 1968).

The correct application of the Robins rule can properly limit liability. Even when the impact rule is eliminated, Robins will still ensure that only those claimants directly damaged by the negligent obstruction will be granted relief. The infinite number of potential third-party contract beneficiaries (such as distributors and suppliers incidentally affected by a vessels' delay) would have no cause of action. See Pruitt v. Allied Chemical Corp., 523 F. Supp. 975 (E.D. Va. 1981).

The court can also analyze the nature of the invaded interest and determine whether it is worthy of the law's

protection. In Oppen, for example, the Ninth Circuit foreclosed recovery by pleasure boaters whose Sunday boating outing was interrupted by the defendant's oil spill. Only those commercial fishermen having a direct and substantial interest in the Santa Barbera channel were permitted recovery. See Oppen v. Aetna Insurance Co., 485 F.2d 252 (9th Cir. 1973).[19]

The fact that this case arises from a limitation of liability proceeding should make the Court leery of the BLACKTHORN's fears of draconian recovery. The BLACKTHORN will have the opportunity in the limitation proceeding below to claim

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[19] Additionally, the court can ensure that Claimants are held to strict proof of their damages. The simple fact that detention occurs does not automatically create damages. Furthermore, the vessels will have a duty to mitigate their damages.

an absolute limit on recovery. Limitation of Liability Act, 46 U.S.C. § 181 et seq. It is particularly inappropriate for the BLACKTHORN to complain about the possibility of unlimited liability when it has already claimed the shelter of the limitation statute.

CONCLUSION

Liability in this case is not based upon speculation. Nor is it based on an incidental economic relationship. Damages are ascertainable and readily provable. To deny recovery would directly contradict the important public policies that permeate all of admiralty law. Claimants should be permitted the opportunity to prove their claims. Accordingly, Claimants respectfully request that a writ of certiorari be issued to review the judgment and opinion of the Eleventh Circuit Court of Appeals, En Banc.

Respectfully submitted,

\\s\\

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APPENDIX

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN THE MATTER OF THE COMPLAINT OF THE UNITED STATES OF AMERICA, AS OWNER OF THE USCGC BLACKTHORN, FOR EXONERATION FROM OR LIMITATION OF LIABILITY /	Case No. 80-658-Civ-T-GC

O R D E R

This action for exoneration or limitation of liability was instituted by the United States as a result of the January 28, 1980 collision between the S/S Capricorn and the Coast Guard buoy tender Blackthron. On March 16, 1981, this Court issued a Memorandum Opinion and Order in 80-134-Civ-T-GC, the related exoneration and limitation of liability action instituted by the owners of the S/S Capricorn, in which this Court dismissed the claims of the owners of a number of vessels who

sought to recover damages incurred as a result of their delayed passage into and out of the Tampa Port due to the collision. Similar "delay claims" have been filed in the instant case. For the reasons stated in the March 16, 1981 Order in 80-134-Civ-T-GC, these claims are dismissed.

DONE and ORDERED in Chambers in Tampa, Florida, this 13th day of October, 1981.

/s/ George C. Carr

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In the Matter of the Complaint of KINGSTON SHIPPING CO. and APEX MARINE CORP., for exoneration from or limitation of liability as owner of the S/S CAPRICORN /	Case No. 80-134-Civ-T-GC

MEMORANDUM OPINION AND ORDER

This action for exoneration or limitation of liability was instituted in the wake of the collision between the S/S CAPRICORN and the Coast Guard buoy tender BLACKTHORN which occurred on January 28, 1980. Because the collision resulted in the blockage of the main ship channel of the Port of Tampa, deep draft vessels were precluded from either entering or departing the Port until the wreckage was cleared. The owners of a number of these vessels (hereinafter referred to as "delay claimants") have filed claims in

this action seeking to recover damages incurred as a result of their delayed passage into and out of the Tampa Port. Motions to dismiss the claims of the delay claimants have been filed by the Plaintiffs, and the Court heard oral argument on the Motions on February 24, 1981.

I.

The Plaintiffs contend that the delay claimants have not stated a claim upon which relief may be granted because their losses are solely economic in nature and were sustained without actual physical impact or damage. Primary reliance for this proposition is placed on the Supreme Court's decision in Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303 (1927), as well as a number of Fifth Circuit cases which adhere to the Robins rule that a negligent uninten-

tional interference with contractual relations which results in a solely economic loss is not actionable. The delay claimants argue that (1) traditional tort principles have replaced (or at least should replace) the _Robins_ negligent interference with contract analysis; (2) the facts in the instant case are distinguishable from _Robins_; and (3) the alleged negligence of the Plaintiffs gives rise to claims predicated on maritime tort, common law negligence and nuisance, and the Rivers and Harbors Act, 33 U.S.C. § 401 _et seq_.

A. _Robins_ in the Fifth Circuit:

Irrespective of its wisdom, _Robins_' traditional rule of nonliability for negligent acts causing economic loss prevails in the Fifth Circuit. _See Louisville and Nashville Railroad Co. v. M/V Bayou Lacombe_, 597 F.2d 469 (5th

Cir. 1979); Dick Meyers Towing Service, Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978); and Kaiser Aluminum and Chemical Corporation v. Marshland Dredging Company, 455 F.2d 957 (5th Cir. 1972). The key issue with respect to the Robins decision, therefore, is whether it is applicable to the facts before the Court. It is argued by the delay claimants that direct, substantial and calculable damages were incurred by them as contrasted to the remote, speculative injury sustained by the Plaintiff time charterer in Robins. The delay claimants point out that recovery has been permitted by two other district courts in this Circuit in very similar circumstances in Petition of China Union Lines, Ltd., 285 F.Supp. 426 (S.D. Tex. 1967), and in

In Re Lyra Shipping Co., Ltd., 360 F. Supp. 1188 (E.D. La. 1973).[1]

A review of the relevant case law reveals that the viability of the Robins rule in this Circuit is not dependent upon the Court's characterization of asserted damage claims as speculative or remote. Indeed, none of the claims which were held precluded by Robins in M/V Bayou Lacombe, Dick Meyers, or Kaiser, supra, were so described by the Court. Instead, the Fifth Circuit has repeatedly stated that in cases of this type "[t]he critical factor is the character of the interest harmed." M/V Bayou Lacombe,

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[1] Cases from other jurisdictions have also been offered by the delay claimants in which the Courts have modified the strict nonliability for negligent interference with contract approach of Robins in favor of a more traditional tort analysis. See, for example, Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968).

supra, 597 F.2d at 473, *Dick Meyers*, *supra*, 577 F.2d at 1025. Thus, as the Court in *Dick Meyers* was unpersuaded by the appellant's attempt to avoid the *Robins* rule by depicting its claim as the breach of a direct duty or as a private action based on a public nuisance, 577 F.2d at 1025, this Court is unmoved by the delay claimants' contention that their claims sound in maritime tort, common law negligence and nuisance. Finally, this Court is not compelled to follow the district court decisions in *In Re Lyra Shipping Co.* and *Petition of China Union Lines, Ltd.*, *supra*, which have escaped full appellate review and which are, in the view of this Court, inconsistent with the most recent articulations of the *Robins* rule in this Circuit.

B. The Rivers and Harbors Act: The delay claimants contend that in addition to the theories urged above, a cause of action against the Plaintiffs exists pursuant to the Rivers and Harbors Act, 33 U.S.C. § 401 et seq. Under the authority of Lauritzen v. Chesapeake Bay Bridge and Tunnel District, 404 F.2d 1001 (4th Cir. 1968), it is argued that the Plaintiffs may be privately sued for obstruction of navigable waters in violation of 33 U.S.C. § 403.[2]

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[2] U.S.C. § 403 provides:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established except

Review of relevant case law reveals that Lauritzen has been rejected in this Circuit, and that the Rivers and Harbors Act of 1899 does not create a private right of action. Intracoastal Transportation, Inc. v. Decatur County, Georgia, 482 F.2d 361 (5th Cir. 1973). Thus, the delay claimants' statutory theory predicated on the Act will not support their claims.

II.

The Court has reviewed all of the counts of the various delay claims,

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on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

liberally construing them in favor of the delay claimants. Conley v. Gibson, 355 U.S. 41 (1957). Nonetheless, the Court concludes that in light of the foregoing, it appears to a certainty that the delay claimants would not be entitled to recover under any state of facts which could be proved in support of their claims. Cook and Nichol, Inc. v. Plimsoll Club, 451 F.2d 505 (5th Cir. 1971). Accordingly, the Plaintiffs' Motions to Dismiss the delay claims are GRANTED.

DONE and ORDERED in Chambers in Tampa, Florida, this 16th day of March, 1981.

/s/ George C. Carr

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6005

In the Matter of the Complaint of HERCULES CARRIERS, INC., for exoneration from or limitation of liability as Owner of the M/V Summit Venture,
Plaintiffs-Appellees,

versus

STATE OF FLORIDA, et al., Claimants,

Canadian Transport Company, Clipper Maritime Co., Ltd., I.S. Joseph Company, Inc., Ultraocean S.A., Sabine Towing & Transportation Company,
Claimants-Appellants.

(Appeal From The United States District Court For The Middle District of Florida)

Before GODBOLD, Chief Judge, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

On May 9, 1980, the M/V Summit Venture, owned by Hercules Carriers, Inc., a foreign corporation, struck the Sunshine Skyway Bridge which spans the entrance of

Tampa Bay. As a result of the collision, damaged and sunken portions of the bridge blocked other vessels' passage to and from the port of Tampa for several days.

Hercules Carriers, as the Summit Venture's owner, filed in district court a Complaint for Exoneration from and Limitation of Liability. The owners of delayed vessels responded with claims for damages for the costs incurred in maintaining those vessels and their crews. These costs included provisions, wharfage charges, additional towing charges, fuel, seamen's wages and loss of the vessels' use.

The district court had already dismissed similar claims made by other parties against another ship, the Capricorn. A few months before the Summit Venture struck the Skyway, the Capricorn had been involved in another collision,

the wreckage of which had also blocked passage to and from the port of Tampa. The district court, for reasons stated in its earlier order of dismissal in the Capricorn's case, dismissed as well the present claims against Hercules.

A panel of this circuit has affirmed the district court's earlier order dismissing claims against the Capricorn. Kingston Shipping Co. v. Roberts, 667 F.2d 34 (11th Cir. 1982). That affirming decision controls the present case.

AFFIRMED.

CLARK, Circuit Judge, concurring specially.

I. Recovery for Pecuniary Loss for Unintentional Interference with Contract

The judgment of the district court must be affirmed in light of Kingston, but respectfully, I think that the panel in

Kingston erred in its holding and in its reliance on Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927). The issue in this case is whether a shipowner, whose vessel negligently obstructs passage of the channel from the port of Tampa to the Gulf of Mexico, is liable in damages for actual costs incurred by vessels which are required to remain in the port pending removal of the obstructing vessel.

The Robins rule is not applicable because the facts here and in Kingston are significantly different from the facts in Robins. In Robins, the time charterer of the S/S Bjornefjord sought damages from the dry dock company for loss of use of the chartered vessel. While the Bjornefjord was in the dry dock for normal repairs, the dry dock company negligently damaged the vessel's propeller causing her

to be detained several additional days. The dry dock company settled with the Bjornefjord's owner. As to the time charterer, the Supreme Court held, "[A] tort to the person or property of one man [the ship's owner] does not make the tortfeasor liable to another [the time charterer] merely because the injured person was under a contract with that other, unknown to the doer of the wrong." 275 U.S. at 309, 48 S.Ct. at 125, 72 L.Ed. at 292. The Court elucidated its grounds for denying recovery to the time charterer as follows:

> The question is whether the respondents [the time charterers] have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter. If they [the charterers] have, it must be worked out through their contract relations with the owners, not on the postulate

> that they *have a right in rem* against the ship.

275 U.S. at 308, 48 S.Ct. at 125, 72 L.Ed. at 292.

The classic case favored by the text writers to illustrate the rationale for barring an action by a contracting party not in privity with the tortfeasor is an early Georgia case. In Byrd v. English, 117 Ga. 191, 43 S.E. 419 (1902), defendants, while excavating for a building, cut a line owned by Georgia Electric Light Company, which powered plaintiff's printing factory. Plaintiff sued the excavator for damages due to the interruption of his printing business. Judge Candler wrote:

> What was [plaintiff's] right to that power supply? Solely the right given him by virtue of his contract with Georgia Electric Light Company, and with that contract defendants are not even remotely connected. If, under the terms of his contract, he is precluded from recovering from the electric light company, that is a matter between themselves

> for which the defendants certainly can not be held responsible. <u>They are, of course, liable to the [electric] company for any wrong that may have beem done it, and the damages recoverable on that account might well be held to include any sums which the company was compelled to pay in damages to its customers; but the customers themselves can not go against the defendants to recover on their own account for the injury done the company</u>.

117 Ga. at 194, 43 S.E. at 420 (emphasis added).

In <u>Robins</u> and <u>Byrd</u>, plaintiff A was in contract with party B, who failed to deliver contracted for benefits to A because of interference from tortfeasor C. Since A's injury resulted from B's failure to perform his contractual obligations, A's remedy, if any, is against B on the contract, and not against C, who cannot be touched for want of privity. The instant case, however, is solely a matter of tort. There is only plaintiff A who has suffered

economic loss at the hands of tortfeasor C. There is no party B, no contract upon which A might base a claim for recovery, and no privity bar to an action against C.[1]

In short, the relationship between the parties in Robins is fundamentally different here; regrettably, Robins has

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[1] This distinction finds support in the case of Federal Commerce & Navigation Co. v. Marathonian, 528 F.2d 907 (2d Cir. 1975), where the court noted that "[t]he Robins rule appears to be based on a contract theory, denying relief to one injured by negligent interference with contract" and that but for the presence of a contract between the vessel ROLWI and the plaintiff time charterer, who lost profits due to delays incurred after the tortfeasor negligently damaged the ROLWI, "we might question whether at least the damage is not so reasonably to be expected as to justify recovery." Id. at 908 (citing Kinsman); see also Pruitt v. Allied Chemical Corp., 523 F.Supp. 975, 981 (E.D. Va. 1981) ("Robins is . . . arguably less than dispositive here, because it essentially involved questions of the law of third party contracts not necessarily applicable in the instant case.").

been extended to situations such as the case here and been interpreted to mean that economic losses not associated with physical damage are not collectible. It is this misapplication of Robins that led the Kingston panel astray in expounding its rationale for denying recovery. In deference, I should point out that the Kingston panel did not wholeheartedly endorse the wisdom of the derived rule, which I believe the circuit must examine en banc.[2]

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[2] The panel quoted Louisville and Nashville Railroad Co. v. M/V Bayou Lacombe, 597 F.2d 469 (5th Cir. 1980), in which Judge Wisdom wrote:

> Whatever the wisdom of the traditional rule of nonliability for negligent acts causing economic loss, Robins reflects the state of the law in this circuit. 667 F.2d at 35 (emphasis added).

II. Recovery for Pecuniary Loss Not Associated with Physical Damage

The negligent obstruction of a navigable channel violates a duty owed to other users of the channel, and is a violation of federal statute.[3] If one negligently obstructs a channel with a sunken ship or other submerged debris, the owner of a vessel striking such an obstruction can recover damages for repair to his vessel, as well as for loss of use; there can be no doubt that in such a case the defendant's negligence is the direct, proximate and foreseeable cause of the

[3] 33 U.S.C. §§ 403, 409; Humble Oil Refining Co. v. Tug Crochet, 422 F.2d 602, 608 (5th Cir. 1970).

shipowner's physical and economic damages.[4] In the same way, one can anticipate that negligent obstruction of the only outlet from a port will cause economic damage to those shipowners whose vessels are trapped in the port and delayed thereby.

Here, appellee's vessel negligently collided with a bridge, resulting in collapse of the bridge and obstruction of the outlet to the port of Tampa. The only two theories that could be advanced to deny recovery for the economic losses sustained by the owners of ships trapped in the bay are (1) the loss is too remote--the practical need for curtailing

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[4] Ingram Corp. v. Ohio River Co., 505 F.2d 1364 (6th Cir. 1974); Gaspar v. United States, 460 F.Supp. 656 (D. Mass. 1978); Oil Transport Co. v. The Lunga Point, 182 F.Supp. 357 (D.C. La. 1960).

potentially limitless liability requires that a line be drawn somewhere, and here that line must be drawn to preclude the shipowners from recovering purely economic losses arising from a collision in which they were not directly involved; and (2) economic loss, unaccompanied by physical damage is unrecoverable as a matter of law.

With regard to the first theory, a court can deny recovery for damages if the loss is catastrophic and the tortfeasor could not foresee the consequences. Res. of Torts 2d § 435(2). Recovery will likewise be denied when the damages are too tenuously or remotely related to defendant's negligence. Petition of Kinsman Transit Authority, 388 F.2d 821 (2d Cir. 1968). The potential for limitless liability need not be a problem in this case, if claims are limited to vessels

trapped inside the bay. It is true that a vessel in New Orleans about to embark for Tampa might be delayed in departing because of the obstruction. However, that vessel can alter its plans to effect a reduction or elimination of its loss; consequently, its losses may be deemed too remote to permit recovery. The vessel caught within the port of Tampa, however, has no means of avoiding the consequences of the negligence of the obstructing vessel. To the extent its losses may be calculated with reasonable certainty, no reason exists to deny recovery.

As to the second theory, several cases indicate that recovery is permissible notwithstanding the lack of physical damage to plaintiff's property.[5] In Union

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[5] Union Oil and Lyra Shipping are discussed below. See also National Steel

Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), the Ninth Circuit held that a clearly finite group of plaintiffs could

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Corp. v. Great Lakes Towing Co., 574 F.2d 339, 343 (6th Cir. 1978) ("The boat struck the railroad bridge due to defendant's negligence, causing structural damage. Since transportation across the bridge was a necessary link in National Steel's production process, plaintiff lost production time during the three days required to repair the bridge. While we agree that at some point the link between cause and effect may be 'too tenuous'--that what is claimed to be consequence is only fortuity, that point is not reached in this case."); Pruitt v. Allied Chemical Corp., 523 F.Supp. 975 (E.D. Va. 1981) (A chemical company that negligently polluted a bay, killing the fish, was held liable for economic losses suffered by commercial fishermen and local boat, tackle and bait shop owners, but not plaintiffs purchasing and marketing seafood from commercial fishermen, whose losses, while foreseeable, were insufficiently direct); In re China Union Lines, Ltd., 285 F.Supp. 426 (S.D. Tex. 1967) ("Certainly, the UNION RELIANCE [the negligent vessel] owed a duty to all those using or seeking to use the ship channel not to obstruct their passage. Further, it was clearly foreseeable that a negligent collision in the narrow channel would effectively delay all traffic for at least some substantial period of time.

recover their heavy financial losses, although they suffered no physical damage. Plaintiffs, commercial fishermen, lost profits due to defendant's oil spill in the Santa Barbara Channel. The court allowed recovery for the purely economic loss resulting from the fish kill, but allowed recovery only to commercial fishermen, although the spill affected other broad categories of activity. The court specifically noted the loss of the use of private pleasure craft, but stated that the plaintiffs asserted "injury to their commercial enterprises, not to their 'occasional Sunday piscatorial pleasure.'" 501 F.2d at 570.

When the negligence of the UNION RELIANCE caused the collision, the duty was breached and the foreseeable was made fact. Consequently, such damages as these claimants may prove were incurred because denied normal access to the channel are, in my opinion recoverable."). Id. at 427.

Limits more relevant to the circumstances of the present case have been suggested. In In re Lyra Shipping Company, Ltd., 360 F.Supp. 1188 (E.D.La. 1973), plaintiffs, having sustained no physical damages, sought recovery of financial losses arising from the collision of the Galaxy Faith with the Industrial Canal Locks. Judge Cassibry, in a thoughtful opinion, stated in a footnote:

> Defendant, in terrorem, suggests that to permit recovery of such costs to all carriers for the entire period the Industrial Canal Locks were closed to marine traffic would impose a crushing burden upon it. Plaintiffs suggest in response that no party should be able to recover such costs whose vessels were not already irrevocably committed to passage through the Locks at the time the accident occurred. The basis of this limitation is that once the nonavailability of the Canal became a foreseeable contingency, all shippers and carriers would be free in the

> future to protect their interests as best they could. Carriers could intelligently estimate their increased costs when offering their services; and shippers likewise could decide whether alternative modes of transportation should be employed in their businesses during the temporary emergency. It is argued, however, that those parties caught unaware were particularly vulnerable to the harm caused by the defendant's conduct and should be afforded special protection.

360 F.Supp. at 1191-92. Judge Cassibry did not decide this question because all the claims allowed by the court grew out of damages suffered by carriers actually traversing the canal at the time the Galaxy Faith struck the Industrial Canal Locks. Nonetheless, the distinction he made would be suitable for distinguishing between many of the claims in the present case where there were ships caught in port as well as ships kept out.

Liability for damages growing out of torts must be decided on a case-by-case

basis depending on the peculiar facts.[6] But for Kingston, I would remand this case to the district court to determine whether any ships proximately delayed by the negligent obstruction can establish unavoidable losses caused thereby. The court would be guided by established tort principles and not be misguided by the misplaced reliance upon Robins. As it is, Kingston must control here, but should be reconsidered by this circuit en banc.

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[6] This comports with Judge Kaufman's analysis in Kinsman, where plaintiff was denied recovery for economic losses, not as a matter of law, but rather "under all the circumstances of this case." Petition of Kinsman Transit Authority, 388 F.2d 821, 825 (2d Cir. 1968).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6078

In the Matter of the Complaint of THE UNITED STATES OF AMERICA, as Owner of the USCGC BLACKTHORN, for exoneration from or of limitation of liability,
Plaintiff-Appellee,

versus

I.S. Joseph Shipping, Ltd., I.S. Joseph Company, Inc., Clipper Maritime Co., Ltd., Pell Nederland, B.V. Termar Navigation Company, Turbana Banana Corp., Gulfcoast Transit Co., ABC Containerline, N.V., Wallenius Rederierna and Motorships, Inc., A/B Helsngfors Steamship Co., Ltd., and Alianza Naviera Argentina, D.A., Marthanassa Compania Naveria, S.A., Navios Corp. and Oceanside Ltd., et al.,
Claimants-Appellants.

Appeal From The United States District Court For The Middle District Of Florida

(November 16, 1983)

Before GODBOLD, Chief Judge, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

This judgment of the district court is affirmed. The accident giving rise to the claim for damages in this case is the same as that in Kingston Shipping Co. v. Roberts, 667 F.2d 34 (11th Cir. 1982), but the defendant is different. That opinion controls this case. However, in In the Matter of the Complaint of Hercules Carriers, Inc. v. State of Florida, Canadian Transport Company, et al., Case No. 81-6005, decided this same day (slip op. p. 715), 720 F.2d 1201, one member of our court suggests that the panel in Kingston, supra, misinterpreted Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927), and that our court en banc should consider the applicability of Robins to this type of case. Reference is directed to the Hercules opinion and special concurrence.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6005

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED

Dec. 13 1983
Spencer D. Mercer
Clerk

In the Matters of the Complaint of HERCULES CARRIERS, INC., for exoneration from or limitation of liability as Owner of the M/V Summit Venture,
Plaintiffs-Appellees,

versus

STATE OF FLORIDA, ET AL., Claimants,

Canadian Transport Company, Clipper Maritime Co., Ltd., I.S. Joseph Company, Inc., Ultraocean S.A., Sabine Towing & Transportation Company,

Claimants-Appellants.

No. 81-6078

In the Matter of the Complaint of THE UNITED STATES OF AMERICA, as Owner of the USCGC BLACKTHORN, for exoneration from or of limitation of liability,
Plaintiff-Appellee,

versus

I.S. Joseph Shipping, Ltd., I.S. Joseph Company, Inc., Clipper Maritime Co., Ltd., Pell Nederland, B.V. Termar Navigation Company, Turbana Banana Corp., Gulfcoast Transit Co., ABC Containerline, N.V., Wallenius Rederierna and Motorships, Inc., A/B Helsngfors Steamship Co., Ltd., and Alianza Naviera Argentina, D.A., Marthanassa Compania Naveria, S.A., Navios Corp. and Oceanside Ltd., et al., Claimants-Appellants.

Appeals From The United States District Court For The Middle District Of Florida

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ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC (Opinion November 16, 1983, 11 Cir., 198__, ___ F.2d___)

(December 13, 1983)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service

having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the case shall be reheard by this Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In the Matter of the Complaint of HERCULES CARRIERS, INC., for exoneration from or limitation of liability as Owner of the M/V SUMMIT VENTURE, Plaintiffs-Appellees,

v.

STATE OF FLORIDA, et al., Claimants,

Canadian Transport Company, Clipper Maritime Co., Ltd., I.S. Joseph Company, Inc., Ultraocean S.A., Sabine Towing & Transportation Company, Claimants-Appellants.

In the Matter of the Complaint of the UNITED STATES of America, as Owner of the USCGC BLACKTHORN, for exoneration from or limitation of liability, Plaintiff-Appellee,

v.

I.S. JOSEPH SHIPPING, LTD., I.S. Joseph Company, Inc., Clipper Maritime Co., Ltd., Pell Nederland, B.V. Termar Navigation Company, Turbana Banana Corp., Gulfcoast Transit Co., ABC Containerline, N.V., Wallenius Rederierna and Motorships, Inc., A/B Helsingfors Steamship Co., Ltd., and Alianza Naviera Argentina, D.A., Marthanassa Compania Naviera, S.A., Navios Corp. and Oceanside Ltd., et al., Claimants-Appellants.

Nos. 81-6005, 81-6078.

March 30, 1984.

Appeals from the United States District Court for the Middle District of Florida, George C. Carr, Judge.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

Because the court is equally divided as to whether to affirm or reverse, the judgment of the district court is AFFIRMED by operation of law.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6078

IN THE MATTER OF THE COMPLAINT OF THE UNITED STATES OF AMERICA, AS OWNER OF THE USCGC BLACKTHORN, FOR EXONERATION FROM OR LIMITATION OF LIABILITY,

Plaintiff-Appellee,

v.

I.S. JOSEPH SHIPPING, LTD., I.S. JOSEPH COMPANY, INC., CLIPPER MARITIME CO., LTD., PELL NEDERLAND, B.V., TERMAR NAVIGATION COMPANY, TURBANA BANANA CORP., GULFCOAST TRANSIT CO., ABC CONTAINERLINE, N.V., WALLENIUS REDERIERNA and MOTORSHIPS, INC., A/B HELSINGFORS STEAMSHIP CO., LTD., and ALIANZA NAVIGERA ARGENTINA, D.A., MARTHANASSA COMPANIA NAVERIA, S.A., NAVIOS CORP. and OCEANSIDE LTD., et al.

Claimants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING
(May 18, 1984)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing as to Gulfcoast Transit Co., et al. filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark

United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 81-6005
81-6078

In the Matter of the Complaint of HERCULES CARRIERS, INC., for exoneration from or limitation of liability as Owner of the M/V SUMMIT VENTURE, Plaintiffs-Appellees,

v.

STATE OF FLORIDA, et al., Claimants,

Canadian Transport Company, Clipper Maritime Co., Ltd., I.S. Joseph Company, Inc., Ultraocean S.A., Sabine Towing & Transportation Company, Claimants-Appellants.

In the Matter of the Complaint of the UNITED STATES of America, as Owner of the USCGC BLACKTHORN, for exoneration from or limitation of liability, Plaintiff-Appellee,

v.

I.S. JOSEPH SHIPPING, LTD., I.S. Joseph Company, Inc., Clipper Maritime Co., Ltd., Pell Nederland, B.V. Termar Navigation Company, Turbana Banana Corp., Gulfcoast Transit Co., ABC Containerline, N.V., Wallenius Rederierna and Motorships, Inc., A/B Helsingfors Steamship Co., Ltd., and Alianza Naviera Argentina, D.A., Marthanassa Compania Naviera, S.A.,

Navios Corp. and Oceanside Ltd., et al.,
Claimants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

JUDGMENT
ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, AFFIRMED by operation of law.

Entered: March 30, 1984
For the Court: Spencer D. Mercer, Clerk

ISSUES AS MANDATE: MAY 31, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF LOUISIANA, ex rel. William J. GUSTE, Jr., Attorney General, et al., Plaintiffs,

Ventura Trading Co., Limited, Inc., et al., Plaintiffs-Appellants,

v.

The M/V TESTBANK, her Engines, Tackle and Apparel, Her Owners, Etc., et al., Defendants,

Partenreederei M/S Charlotta, Etc., et al., Defendants-Appellees.

No. 82-3059.

United States Court of Appeals
Fifth Circuit.

April 2, 1984.

Before WISDOM, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

I.

On July 22, 1980, the M/V SEA DANIEL collided with the M/V TESTBANK in the Mississippi River Gulf Outlet. This

collision resulted in the spillage of a large quantity of highly toxic chemicals that were being carried aboard the TESTBANK. Because of the spillage, federal and state authorities closed off a large area of the Outlet and nearby waterways to navigation and commercial fishing for nearly three weeks.

The owners of the two vessels filed petitions for limitation of or exoneration from liability in the United States District Court for the Eastern District of Louisiana. Various parties filed claims in the limitation action; others filed complaints against the shipowners. The numerous cases involving the collision were all consolidated in the district court.

On December 16, 1981, the district court granted in part the defendants' motion for summary judgment and dismissed

all of the plaintiffs except the commercial fishermen and oystermen. State of Louisiana ex rel. Guste v. M/V Testbank, E.D.La.1981, 524 F.Supp. 1170. In accordance with rule 54(b) of the Federal Rules of Civil Procedure, the district court certified this decision as a final judgment with respect to the dismissed plaintiffs.[1] Those plaintiffs, now the appellants before this Court, comprise two groups of persons or businesses that allegeldy suffered injury because of the closure of the Outlet: (1) vessel owners and terminal operators who lost profits

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[1] While this appeal was pending, the district court proceeded to adjudicate the liability of the defendants with respect to the remaining plaintiffs. On January 5, 1984, the court issued a final judgment holding that the collision was caused by the negligence of those navigating the SEA DANIEL. On January 18, 1984, the owners of the SEA DANIEL filed a notice of appeal.

and incurred additional expenses because of shipping delays ensuing from the closure of the Outlet, and (2) various commercial businesses (e.g. seafood dealers, marina operators, and bait and tackle shops) who suffered a loss in trade because of the closure.

II.

Building on the Supreme Court's decision in Robins Dry Dock & Repair Co. v. Flint, 1927, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290, the Fifth Circuit Court of Appeals has developed a doctrine of maritime law that controls the outcome of this case: in a law suit based upon the alleged negligence of a defendant, a plaintiff cannot recover consequential economic losses if the alleged negligence has not caused any physical damage to the property or person of the plaintiff, Akron Corp. v. M/T Cantigny, 5 Cir.1983 (per curiam), 706

F.2d 151, 153; accord Kingston Shipping Co. v. Roberts, 11 Cir.1982 (per curiam)(summary calendar), 667 F.2d 34, 35, cert. denied, 458 U.S. 1108, 102 S.Ct. 3487, 73 L.Ed.2d 1369; see also Vicksburg Towing Co. v. Mississippi Marine Transport Co., 5 Cir.1980, 609 F.2d 176; Louisville & Nashville Railroad Co. v. M/V Bayou Lacombe, 5 Cir.1979, 597 F.2d 469; Dick Meyers Towing Service, Inc. v. United States, 5 Cir.1978, 577 F.2d 1023, cert. denied, 1979, 440 U.S. 980, 99 S.Ct. 1215, 59 L.Ed.2d 455.

The factual situation in the present case is in all relevant respects indistinguishable from that in Akron (and Kingston). In Akron, the defendant vessel grounded in the Southwest Pass of the Mississippi River and thereby prevented large vessel traffic from entering or leaving tht part of the river for several

days. Owners and charterers of vessels blocked by the closure of the pass sued for additional expenses and other damages caused by the ensuing delays. Basing its decision on the Robins doctrine, the Court of Appeals affirmed the district court's grant of summary judgment for the defendant. The result was the same in Kingston. These cases are dispositive of the present appeal.

The decision of the district court is AFFIRMED.

WISDOM, Circuit Judge, concurring.

I write separately to suggest that the Fifth Circuit Court of Appeals reconsider this case en banc.

The Fifth and Eleventh Circuit decisions cited in the panel opinion have extended the Robins doctrine far beyond the actual holding of the Supreme Court in that case. In Robins, the propeller of a

ship was negligently damaged by the operators of a shipyard. This damage caused a delay in the return of the ship to sea, and a party who had chartered the ship sued the shipyard for the charterer's economic losses that were sustained because of the delay. The plaintiff won in the trial court and on appeal to the Second Circuit Court of Appeals. The Supreme Court reversed, holding that the shipyard's damage to the propeller wronged only the owner of the ship. The Court further held that, because the charterer's contract with the shipowner was unknown to the repair yard, the contract was a matter of indifference to the yard. Therefore, negligent interference with the contract would furnish no basis for an action against the shipyard for profits lost by the charterer. As the Court stated,

> [the plaintiff's] loss arose only through [its] contract with the owners--and while intentionally to bring about a breach of contract may give rise to a cause of action, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. The law does not spread its protection so far.

275 U.S. at 308-09, 48 S.Ct. at 135 (citations omitted).

Thus, Robins holds only the following: if a defendant's negligence injures a party "A", and the plaintiff suffers economic loss because it had a contract with "A," the plaintiff has no cause of action against the defendant based on the defendant's negligence. The Fifth Circuit has extended Robins unnecessarily by establishing an absolute requirement of physical property damage.

This extension is certainly not required by Robins, and the physical-damage requirement is itself artificial.[1] There is only one justification for this requirement: given that Robins establishes a policy of restricting the type of plaintiff who can recover for a defendant's negligence, physical property damage furnises an easily discernible boundary between recovery and nonrecovery.

In my opinion, the utility derived from having a "bright line" boundary does not outweigh the disutility caused by the limitation on recovery imposed by the physical-damage requirement. In Robins a

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[1] For example, if a vessel negligently crashes into one marina and then sinks, thereby blocking all access to another marina, the first marina may recover all of its consequential economic losses, but the second may not.

great judge, Oliver Wendell Holmes, had an off-day.[2] If the Court were writing on a blank slate, I would recommend holding the defendants liable for all of the harm proximately caused by their negligence. The resulting liability in accidents such as the one here would indeed be large, but it could be handled by the insurers of the shipping companies. Placing the losses on the shippers' insurers would ensure that the shipping industry pays for all of the costs that result from the activities of the industry. Such a result would be fairer to persons who were injured by the activities of the shipping industry, and

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[2] As legal historians have noted, Justice Holmes attempted throughout his career to restrict liability as much as possible. See G. Gilmore, The Death of Contract 14-17 (1974). This concern for limiting liability is out of step with contemporary tort doctrine.

it would also induce the industry to adopt measures to minimize the harm that the industry imposes on others. The Court's concern with preventing the filing of lawsuits of a highly speculative nature, see Akron, 706 F.2d at 153, can be adequately addressed within the doctrinal context of traditional tort requirements of foreseeability and proximate causation.

But of course, the Court is not writing on blank slate; we must follow Robins. Nonetheless, we need not extend Robins beyond the holding of that case. The Fifth Circuit Court of Appeals should reconsider this case en banc and repudiate the doctrine that physical property damage is prerequisite to recovery of economic losses. In a situation such as that presented by the instant case, the only parties who should be precluded from recovering are those who sustain economic

losses because they have contractual dealings with persons who are directly injured by the defendant's negligence. This result is both fairer and more justifiable economically than the result mandated by _Akron_.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3059

STATE OF LOUISIANA, ex rel WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, ET AL.,

Plaintiffs,

VENTURA TRADING COMPANY, LIMITED, INC., ET AL.,

Plaintiffs-Appellants

versus

THE M/V TESTBANK, her engines, tackle and apparel, her owners, etc., ET AL.,

Defendants,

PARTENREEDEREI M/S CHARLOTTA, ETC., ET AL.,

Defendants-Appellees.

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Appeals from the United States
District Court for the
Eastern District of Louisiana

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ON SUGGESTIONS FOR REHEARING EN BANC
(Opinion April 2, 1984,
5 Cir., 198___, _____ F.2d _____)

(May 14, 1984)

Before CLARK, Chief Judge, BROWN, WISDOM, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the applications for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.